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In The Supreme Court Of The United States

OCTOBER TERM, 1996

DELORES E. HAIRSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the abuse of discretion standard required by Koon V. United States is a workable measure at the appellate level, and if it is, whether it is being faithfully followed in the court of appeals.

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IN THE SUPREME COURT OF THE UNITED STATES

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On Petition For A Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Delores E. Hairston respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, 1a - 14a) is reported at 96 F.3d 102. The opinion of the district court docket number, 3:94-CR-00153-1, is unreported.

JURISDICTION

The Court of Appeals entered its judgment on September 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Title 18 United States Code Section 3553(b) in relevant part states:

> **Application of Guidelines in imposing a sentence.** The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In an absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have

> due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

STATEMENT

This case involves the application and interpretation of the Court's decision in Koon v. U.S., ___ U.S. ___, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) which determined what standard of review should be applied in reviewing decisions to depart from the sentencing guidelines. The district court downwardly departed from the applicable guideline pursuant to Title 18 U.S. Code § 3553(b) and U.S.S.G. §5K2.0 Grounds for Departing (Policy Statement), U.S. Sentencing Guidelines.

Petitioner Delores Hairston was employed as a branch manager for the First Union National Bank of North Carolina in Charlotte, North Carolina. Sometime beginning in August of 1987 and continuing until early 1994, Hairston began diverting

bank funds for her own use. When confronted by bank officials on January 19, 1994, Ms. Hairston admitted the theft.

On February 28, 1995, the bank and Hairston entered into a settlement agreement and release of the bank's civil claims against her. It was acknowledged in the settlement papers that friends and supporters of Ms. Hairston had made available to her the sum of $250,000 in order to resolve her liability to the bank. Ms. Hairston also agreed to cooperate fully with the bank and to give truthful testimony in any proceeding seeking to recover additional sums. In consideration of the payment, the bank discharged and released Hairston from any and all claims, actions or causes of action which it had or which might thereafter arise as a result of the theft or conversion by Hairston of a sum in excess of $607,000. Additionally, the bank agreed to inform the district court and the U.S. Attorney's office of the payments made on her behalf, of the Release and the bank's opinion that the

payments made on behalf of Hairston constituted "extraordinary restitution" which would entitle Hairston to such consideration as the Court might deem appropriate for sentencing purposes.

Thereafter, on March 8, 1995, Hairston entered a plea agreement with the government in which she agreed to plead guilty to the charge of bank fraud, Title 18 U.S.C. § 1344.

At sentencing, after receiving evidence from the petitioner and the government and hearing argument of counsel, the district court found as a fact that the funds available to the bank would not have been available except for Petitioner's cooperation and her prevailing upon the generosity of her friends, and that her efforts did represent extraordinary efforts at restitution. The district court held:

> Under the circumstances, everybody's better off when extraordinary efforts at restitution pay the bank back substantial fractions of the monies that they lost which would otherwise not be available, that as a factual matter exists in this case, and I therefore believe that

> I have the discretion to depart downward and will depart downward to a level 12.

Sentence was imposed within guideline level 12, and the government timely appealed. Ms. Hairston served the sentence imposed in the custody of the Attorney General.

On April 3, 1996, after argument of the government's appeal at the March, 1996 term in Baltimore, the court of appeals placed the case in abeyance pending a decision by this Court in Koon v. United States. The Court announced its decision in Koon on June 13, 1996. On July 9, 1996, the court of appeals removed the case from abeyance and directed counsel for the parties to submit supplemental briefing regarding the impact of the Court's decision in Koon on the appeal before it.

After further briefing, the court of appeals reversed the district court's decision and remanded the case for resentencing. The court of appeals held that the district court abused its discretion in finding Hairston's restitution provided a

proper basis for departing from the Guidelines.

REASONS FOR GRANTING THE PETITION

Since this Court's decision in Koon v. United States was announced, in a variety of contexts the court of appeals has failed to adhere to the rules announced in that decision, and guidance from this Court is imperative. This case is a timely opportunity for the Court to provide that guidance, and to further define and to enforce the standard of review outlined in Koon. Moreover, the decision below is erroneous, and the issue that it addresses is important.

I. The Court Of Appeals' Interpretation Of and Application Of Koon v. United States Is Erroneous.

The court of appeals failed to follow the standard of review governing appeals from a district court's decision to depart from sentencing ranges, as set forth by this Court in Koon v. United States, ___ U.S. ___ 116 S. Ct. 2035, 135 L.Ed.2d 392 (1996). This Court

held that an "appellate court should not review the departure decision de novo, but instead should ask whether the sentencing court abused its discretion." Id. at 2043. Although the court of appeals in this case opined that it reviewed the district court's decision under an abuse of discretion standard, it is clear that it did not, choosing simply to substitute its discretion for that of the trial court.

This Court in Koon recognized that the Sentencing Guidelines Act authorizes a district court to depart from the sentencing guideline or range in cases that "feature aggravating or mitigating circumstances of a kind or degree not adequately taken into consideration by the Commission." 18 U.S.C. §3553(b). The Commission formulated each guideline to apply only to the heartland of typical cases, not to the atypical cases which take a case out of the heartland of cases. Koon, 116 S.Ct. at 2044-45.

An encouraged factor, such as restitution, is not always an appropriate

basis for departure, because on some occasions the applicable guideline will have taken the encouraged factor, such as restitution, into account. See Koon, 116 S. Ct. 2035. A court still may depart on the basis of such factor but only if it "is present to a degree substantially in excess of that which is ordinarily involved in the offense." U.S.S.G. §5K2.0. In this case, the district court determined that Hairston's restitution was extraordinary, and thus took this case out of the heartland of cases.

Whether a factor is a permissible basis for departure under any circumstance is a question of law. Id. However, once it is determined that a factor is a permissible basis for departure, whether such a factor is present to a degree substantially in excess of that which ordinarily is involved in the offense is a question of fact, one which should be properly left for the district court. This Court held that the district court is due substantial deference in making these determinations, because such a decision

embodies the traditional exercise of discretion by a sentencing court. Id. This Court has instructed that "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." Williams v. United States, 503 U.S. 193, 205, 112 S. Ct. 1112, 1121, 117 L.Ed.2d 341 (1992).

Here, the court of appeals failed to give substantial deference (indeed it gave no deference) to the *factual* determinations made by the district court. The court of appeals determined that extraordinary restitution is a permissible basis for departure under some circumstances. (App. infra, 10a). Thus, under the standard of review mandated in Koon, no error of law was made by the district court, and the court of appeals should then have given substantial deference to the district court's factual determination and decision.

After concluding that extraordinary restitution may be a permissible basis for

departure, the court of appeals opined that the express factual determinations of the district court, specifically that Hairston's efforts at restitution represented extraordinary efforts at restitution, were erroneous. (App. infra, 13a). This clearly factual determination which was based on record evidence should have been accorded substantial deference by the court of appeals.

The court of appeals further determined that Hairston's efforts at restitution were not extraordinary because of the timing of the restitution payment and the fact that payments came from Hairston's friends. These determinations are surely factual matters and are better left to the district courts which have the greater ability to compare restitution in the present case with others it has seen, including specific factors, such as the amount paid versus the total resources available to a defendant, and to judge the credibility of witnesses. In this case, the district court specifically compared

Hairston's efforts at restitution to those efforts at restitution made by the defendant in U.S. v. Bolden, 889 F.2d 1336 (4th Cir. 1989). Furthermore, the district court compared the facts in this case to facts in other sentencing guideline cases and distinguished this case by holding "the funds available, made available to First Union National Bank would not have been made available, that these are not simply going out and borrowing merely from credit unions and the like as set forth in Bolden, but do represent extraordinary efforts at restitution." The district court further held that "under the circumstances, everybody's better off when extraordinary efforts at restitution pay the bank back substantial fractions of the monies that they lost which would otherwise not be available." As shown in the record, the district court in this case made specific findings as to why Hairston's restitution took this case out of the heartland of cases and therefore the

district court's factual determination based on record evidence should not have been disturbed.

Furthermore, even if one of the factors upon which the district court based its decision standing alone is found to be on appeal insufficient to warrant a downward departure, the several factors taken together could present a situation that is enough to take this case out of the heartland of cases considered by the sentencing commission. See U.S. v. Ramirez, 1996 WL 48210 (10th Cir.).

The court of appeals apparently found that whether a departure for extraordinary restitution is warranted depends upon a subjective determination of the defendant's acceptance of responsibility. (App. infra, 12a-13a). Plainly, a district court is in a superior position to evaluate a defendant's subjective acceptance of responsibility by observing the defendant in the courtroom and hearing testimony regarding the defendant's characteristics and behavior.

In another post-Koon case, the Court of Appeals for the Sixth Circuit found that, although the court of appeals disagreed with the district court's interpretation of the lesser harms policy statement and the court's application of such statement, the court of appeals did not believe that such interpretation or application constituted plain error considering the deference the court of appeals owed to the district court's determination that the case falls outside a guideline's heartland. U.S. v. Barajas-Nunez, 91 F.3d 826 (6th Cir. 1996). The court of appeals stated that it owed substantial deference to the district court's determination that a case falls outside a guideline's heartland. Thus, the Sixth Circuit's application of the standard of review defined in Koon differs significantly from the standard applied by the court of appeals in this case.

II. A Number Of Appellate Courts Have Failed To Adhere To The Standard Of Review Mandated In Koon

Appellate courts including the Fourth Circuit have failed to apply the standard of review mandated in Koon. This case is a timely opportunity for this Court to further define the abuse of discretion standard of review articulated in Koon.

The Ninth Circuit apparently found itself unable to apply the Koon abuse of discretion standard in U.S. v. Samblan, 90 F.3d 362 (9th Cir. 1996). The court of appeals held that the sentencing court abused its discretion in departing from the guidelines without comparing the case to other guidelines cases. The court opined that although a district court's departure is reviewed for abuse of discretion, ultimately the governing statute requires that the sentence not be "unreasonable." The court held that a decision would be unreasonable if the district court did not make its determination by comparing the case at issue

to other guideline sections. Thus, the court of appeals determined that although the district court had adequately explained its decision to depart upward it did not adequately explain the degree of departure. However, this Court in Koon did not hold that a district court must explicitly explain the extent of such departure as well as the reasons for departure by explicit comparison with other cases. Koon should not be interpreted to mandate such a rigid structure for departure from the guidelines.

The Ninth Circuit again misinterpreted the standard of a review defined in Koon in U.S. v. Goshea where the court held "a district court abuses it discretion if the extent of an upward departure is not governed by reference to individual guideline provisions, where possible, and otherwise to the structure of the guidelines as a whole." 94 F.3d 1361 (9th Cir. 1996) (citing U.S. v. Samblan 90 F.3d 362, 365 (9th Cir. 1996)). In Goshea, the court upheld the district

court's decision to depart from the guidelines because the appellate court found the district court's reasoning "sufficient" Id. at 1366. Under the abuse of discretion standard defined in Koon, it is not the responsibility of an appellate court to determine whether the district court's reasoning with respect to such a fact finding is "sufficient"; it is the appellate court's responsibility only to determine if the district court *abused its discretion* in making a factual determination.

The Seventh Circuit failed to follow the Koon standard of review in U.S. v. Pullen, 89 F.3d 368 (7th Cir. 1996). The court concluded that a history of being abused as a child may be a proper ground for departure from the applicable guidelines sentencing range, but only if the defendant is able to show that in his particular case the presence of this factor made his case an extraordinary one. Id. at 372. Some record evidence existed regarding how this defendant's history of abuse took his case

out of the heartland of cases. Despite such evidence, the court of appeals held that "the determination of whether the case is extraordinary is committed to the discretion of the district judge," but found that the defendant in this case failed to show how his particular history of abuse made his case extraordinary and therefore the district court abused its discretion. The appellate court made this conclusory statement regarding the district court's abuse of discretion without any apparent consideration of how the record failed to show that the defendant's particular history of abuse was not extraordinary or how the district court abused its discretion in particular. If the factual determination regarding whether or not a case is extraordinary is truly committed to the discretion of the district court, then appellate courts should not reverse district courts factual determinations which are plainly supported by some record evidence in cases such as U.S.

v. Goshea, U.S. v. Pullen, U.S. v. Samblan and U.S. v Hairston.

Furthermore, in U.S. v. Weinberger, the Government appealed the district court's downward departure for extraordinary forfeiture where the amount paid by the defendant to settle the government's civil forfeiture action actually exceeded the amount the defendant was alleged to have defrauded the Government. 91 F.3d 642 (4th Cir. 1996). The Fourth Circuit reversed the district court and concluded that exposure to civil forfeiture is not a valid basis for departure under the sentencing guidelines. The appellate court reasoned that defendants should not be allowed to buy their way out of prison sentences and that the proper remedy in such cases is to contest the forfeiture itself. This Court has held "Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance.... Thus, for the courts to conclude a factor must not be considered under any circumstance

would be to transgress a policy-making authority vested in the Commission." Koon v. U.S., 116 S.Ct. at 2050. The Fourth Circuit plainly failed to follow the holding in Koon. Although extraordinary forfeiture may be a discouraged factor, it is not a factor prohibited by the Sentencing Commission in the guidelines, and thus, could potentially be relied upon in extraordinary circumstances.

The D.C. Circuit failed to follow the standard of review mandated in Koon in U.S. v. Dyce, 91 F.3d 1462 (D.C. Cir. 1996). Congress has directed the Sentencing Commission to "assure that the guidelines and policy statements... reflect the general inappropriateness of considering the... family ties and responsibilities... of the defendant." 28 U.S.C. §994(e). However, a departure is permitted when family circumstances are extraordinary. U.S. v. Dyce, 91 F.3d 1462 (D.C. Cir. 1996). In reviewing a district court's determination that a downward departure was warranted for

extraordinary family circumstances, the appellate court in Dyce held that "a district court's determination that extraordinary family circumstances exist will be entitled to considerable respect on appeal." Id. (citing U.S. v. Canoy, 38 F.3d 893, 908; see also United States v. Alba, 933 F.2d 1117, 1122 (2nd Cir. 1991); cf. United States v. Kim 23 F.3d 513, 517 (D.C. Cir. 1994)). The district court departed from the guidelines based in part upon the fact the defendant was the father of a nine-year-old son with neurological problems who was in need of special supervision and his wife suffered from fragile mental health. The court of appeals reversed the district court because the record did not indicate that the family circumstances and other factors relied upon by the district court were present in this case to an exceptional degree and thus could not form the basis for downward departure. Id. at 759. The court of appeals failed to adhere to the Koon standard of review and also failed to follow the D.C. Circuit's own

standard that a "determination that extraordinary family circumstances exist is entitled to considerable respect on appeal."

The confusion among the appellate courts with respect to the abuse of discretion standard in Koon and what constitutes "extraordinary" facts is further evidenced by Judge Wald's dissenting opinion in U.S. v. Dyce, 91 F.3d 1462, 1472-73 (D.C. Cir. 1996) rehearing en banc denied. Judge Wald dissented from her Circuit's denial of the defendant's petition for rehearing en banc. Although the D.C. Circuit opined that the district court's decision was given deference on appeal, it is clear that the court did not give the district court's decision such repose. The court of appeals reversed the district court because the district court's conclusion was unsupported by record evidence and was thus an abuse of discretion. Id. at 1467. Judge Wald observed that although what constitutes "extraordinary" circumstances justifying a departure from the guidelines for family

responsibilities is admittedly a "murky one," the panel not only invaded the "district court's discretion as to its overall assessment of Dyce's family responsibilities, but it misread the record in the process since there was not firm evidence that Dyce's family would, in fact, care for all three of appellate's children." Id.

As in Hairston, the court in Dyce announced the appropriate standard of review, but then failed to follow such standard faithfully. In both cases the court of appeals acknowledged that the factual determinations of the district court were due great deference, but then proceeded to reverse the district court decisions in a conclusory fashion ignoring record evidence which clearly supported the district court's factual determination. Appellate courts remain confused regarding what constitutes extraordinary circumstances in a number of cases.

In a decision announced after the decisions in this cause, the Fourth Circuit

attempted to refine the standard of review in Koon but in doing so again failed to follow Koon faithfully. U.S. v. Rybicki, 96 F.3d 754 (4th Cir. 1996). The Fourth Circuit there prescribed an analysis for sentencing courts to follow when deciding whether to depart from the sentencing guidelines and attempted to clarify the standards for review of departure decisions defined in Koon. Among other things the court of appeals included in its analysis:

> Factors that are "encouraged," "discouraged," or "unmentioned" require further analysis. "Encouraged" factors, *see*, E.G. U.S.S.G. §5k2.10 (victim provocation as a downward departure of factor); U.S.S.G. §5k2.7 (disruption of governmental function as an upward departure factor), are usually appropriate bases for departure. But such factors may not be relied upon if already taken into account by the applicable guideline, and that involves interpreting the applicable guideline, which we review de novo to determine whether the district court abused its discretion.

U.S. v. Rybicki, 69 F.3d 754, 758 (4th Cir. 1996).

In its attempted clarification, the Fourth Circuit shows only that it

misunderstands the standard of review defined in Koon. Koon does not hold that factors already taken into account by the applicable guideline may never be relied upon, nor does it hold that review of a district court's determination with respect to a factor already taken into account necessarily is a *de novo* standard of review. Koon specifically held that an encouraged factor already taken into account in an applicable guideline, may be a basis for a departure from the guidelines if it "is present to degree substantially in excess of that which ordinarily is involved in the offense." Koon v. U.S., 116 S.Ct. at 2045.

This survey of cases compels the conclusion that appellate courts have been inconsistent in determining when factors are present to an "exceptional" degree and thus constitute a basis for downward departure.

CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectively submitted,

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellant,

v.

Delores Elease HAIRSTON,
Defendant-Appellee.

No. 95-5771.

United States Court of Appeals
Fourth Circuit,

Argued March 8, 1996.
Decided Sept. 16, 1996.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

The Government appeals the district court's decision to depart from the Sentencing Guidelines due to the defendant's "extraordinary restitution." The defendant's restitution, offered to settle her civil liability to her employer, equaled less than half the amount she embezzled and came not from her own funds but from the generosity of friends. Concluding that the district court abused its discretion in finding that these circumstances merited departure, we reverse.

I.

The parties do not dispute the underlying facts of this case. Delores Hairston worked as a branch manager for the First Union National Bank of North Carolina. Beginning in August 1987, Hairston began diverting bank funds to her personal use. Her managerial position enabled her to avoid detection for more than five years, and she ultimately embezzled a total of $607,777.08. Her scheme came to an end, however, when an internal bank audit in 1993 uncovered certain "irregularities" attributable to her conduct. When bank officials confronted Hairston about

the irregularities, she admitted the theft.

In May 1994, during an interview with agents of the Federal Bureau of Investigation, Hairston disclosed that she had expended all of the embezzled funds. She spent the stolen money: (1) to pay for her children's college expenses; (2) to make up for losses on defaulted loans of bank customers; (3) to provide personal loans to friends and others; (4) to contribute to church related activities; and (5) to buy personal items, including clothes and jewelry.

While federal authorities pursued their investigation, Hairston attempted to reach a civil settlement with the bank. On August 5, 1994, Hairston gave a sworn statement to the bank in which she averred that she had spent all the diverted funds and had few available assets. On October 3, 1994, a federal indictment was returned charging Hairston with bank embezzlement, making false entries in bank records, and bank fraud.

On February 28, 1995, Hairston and the bank entered into a settlement agreement and release. Hairston, through the generosity of friends and her church, repaid the bank $250,000 to settle her civil liability. In return, a bank official promised to testify, during Hairston's criminal proceedings, as to his belief that the $250,000 payment constituted "extraordinary restitution."

Thereafter, on March 8, 1995, Hairston entered into a plea agreement with the Government in which she agreed to plead guilty to the charge of bank fraud. At a sentencing hearing, Hairston introduced the bank officer's testimony and contended that her efforts at restitution merited a departure from the Guidelines.

The district court accepted Hairston's argument, finding that the Bank would not

have recovered any of its loss but for Hairston's extraordinary efforts at restitution. The court determined that her efforts merited a departure from the Guidelines and reduced her offense level by five, from seventeen to twelve. The court then sentenced Hairston to six months imprisonment, followed by six months probation and three years of supervised release; without the departure, her sentencing range would have been twenty-four to thirty months imprisonment.

II.

The Government contends that the district court improperly considered the $250,000 Hairston obtained from her friends in determining whether to grant Hairston a departure from the appropriate Guideline range. The Government does not maintain that "extraordinary restitution" may never provide a proper basis for departure from the Guidelines, but asserts that under the facts of this case, the district court abused its discretion in finding Hairston's restitution "extraordinary." Hairston counters that because the total amount of restitution was substantial and because the victim of the embezzlement—the bank—would have recovered nothing absent the restitution, the district court properly found the circumstances "extraordinary" and appropriately departed from the Guidelines.

A.

The Supreme Court recently clarified the appropriate standard of appellate review of a district court's decision to depart from the Guidelines. *Koon v. United States*, ___ U.S.___, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). *Koon* had been argued but not decided when we heard oral argument in this case. Accordingly, we held this case in abeyance while awaiting the Supreme Court's opinion. In the wake of it, we asked the parties to

file supplemental briefs on the opinion's impact on this case, which they have now done.

In *Koon*, the Supreme Court directed that "appellate court[s] should not review the departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion." *Id.* at _____, 116 S.Ct. at 2043. The Court explained that the deferential standard of review was appropriate because although the Guidelines were intended to cabin the sentencing court's discretion in the typical case, *see* U.S.S.G. Ch. 1, Pt. A, intro., Congress and the Sentencing Commission had not intended to wholly divest district courts of their traditional sentencing functions. *Id.* at ____, 116. S.Ct. at 2044. As the Court explained:

Acknowledging the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances, *see* 28 U.S.C. § 991(b)(1)(B), Congress allows district courts to depart from the applicable Guideline range if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, *not adequately taken into consideration* by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). To determine whether a circumstance was adequately taken into consideration by the Commission, Congress instructed courts to "consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Ibid.*

Turning our attention, as instructed, to the Guidelines Manual, we learn that the Commission *did not adequately take into account* cases that are, for one reason or another, "*unusual*." 1995 U.S.S.G. ch. 1, Pt. A, intro. comment. 4(b).

Id. (emphasis added).

To aid sentencing courts in determining if an asserted basis for departure removes a case from the "usual" (the "heartland" for which the guideline was designed), the Commission lists several factors that may never provide a proper basis for departure (e.g., race, sex, national origin, etc.). "[W]ith the exception of those listed factors," the Commission states that it "does not intend to limit the kind of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." *Id.* (quoting 1995 U.S.S.G. ch. 1, Pt. A, intro. comment. 4(b)). For further guidance, however, the Commission enumerates certain other factors that it views as either "encouraged," *see* U.S.S.G. § 5K2.0 *et seq.*, or "discouraged" bases for departure. *See* U.S.S.G. § 5H1.1 *et seq.*

If the special feature suggested as a basis for departure is an encouraged factor, then a court can depart on that basis, if that feature is not already taken into account in the applicable guideline. If the special feature is a discouraged factor, or an encouraged factor already taking into account in the applicable guideline, then a court can depart "only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Koon*, ____ U.S. at ____, 116 S.Ct. at 2045. Finally, if the special feature is not mentioned at all in the Guidelines, before departing on this basis, a court must consider the "structure and theory" of the relevant individual guideline and the Guidelines as a whole, bearing in mind that departures on the basis of factors not mentioned in the Guidelines will be "highly infrequent." *Id.*

The Supreme Court in *Koon* repeatedly emphasized the sentencing court's primacy in

determining whether a factor merits departure in the individual case. Due to its greater experience with sentencing determinations, the district court enjoys an "institutional advantage" over an appellate court in making this determination. *Id.* at ____, 116 S.Ct. at 2047.

In performing its role, the sentencing court's duty is to make a "refined assessment of the many facts bearing on the outcome, informed by [the court's] vantage point and day-to-day experience in criminal sentencing." *Id.* at ____ - ____, 116 S.Ct. at 2046-47. Thus, a sentencing court must determine not as a general matter whether a suggested basis for departure is within the heartland, but whether it is within the heartland given the specific facts of the particular case. *Id.* Although the sentencing court may rely on its individual sentencing experience, this factor is not solely determinative and the question of "[w]hether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other guidelines cases." *Id.* at ____, 116 S.Ct. at 2047.

An appellate court generally gives "substantial deference" to the district court's decision to depart, but appellate review is not an "empty exercise." *Id.* at ____, 116 S.Ct. at 2046. Totally unfettered discretion on the district court's part would simply raise anew the problems with sentencing disparity that Congress created the Sentencing Guidelines scheme to prevent. Thus, in performing its review, an appellate court, like the sentencing court, must consider both existing case law and the "structure and theory" of the Guidelines as a whole, and, with due regard to the district court's institutional advantage, assess

whether the circumstances of the particular case are so exceptional as to take the case out of the heartland and warrant departure from the Guidelines.

We set out the Supreme Court's analysis in *Koon* at some length because the standard of appellate review established therein uses a different nomenclature than the one previously applied in this circuit. We had previously applied a multi-part analysis involving:

> (1) a *de novo* standard [of review] to determine whether the reasons the district court used to support its departure encompassed a factor "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," (2) a clearly erroneous standard to review whether the district court had adequate factual support to depart on the basis of the factor, (3) an abuse of discretion standard to determine whether the factor is of sufficient importance to justify a sentence outside the guideline range, and (4) a abuse of discretion standard to review whether the extent of the departure was reasonable.

United States v. Brown, 23 F.3d 839, 841 (4th Cir. 1994) (citing *United States v. Hummer*, 916 F.2d 186, 192 (4th Cir. 1990), *cert. denied*, 499 U.S. 970, 111 S.Ct. 1608, 113 L.Ed.2d 670 (1991)).

Koon abolishes "*de novo*" review and substitutes a "unitary abuse of discretion standard." ____ U.S. at ____, 116 S.Ct. at 2048. This review for abuse of discretion, however, includes a legal analysis as to whether the Commission listed certain factors as forbidden, discouraged, or encouraged departure bases. We do not accord a district court's legal conclusions on these questions any particular deference. However, we do

defer to a sentencing court's fact-based determination as to whether the presence of a suggested feature removed a case from the "heartland" for which the guideline was designed. Because "[a] district court by definition abuses its discretion when it makes an error of law," our overall review is thus for abuse of discretion. *Id.*

B.

The feature in this case that potentially takes it outside the Guidelines' "heartland" is, of course, Hairston's efforts at restitution. The district court concluded that a departure on the basis of extraordinary restitution was warranted for the following reasons:

> The Court finds as a fact that the funds available, made available to First Union National Bank would not have been made available, that these are not simply going out and borrowing money from credit unions and the like ..., but do represent extraordinary efforts at restitution. And under the circumstances, everybody's better off when extraordinary efforts at restitution pay the bank back substantial fractions of the monies that they lost which would otherwise not be available, that that as a factual matter exists in this case, and I therefore believe that I have the discretion to depart downward and will depart downward to a level 12.

The district court, of course, did not have the benefit of the *Koon* decision when making this determination. Accordingly, it failed to make any analysis as to whether the Commission forbade, discouraged, or encouraged departure based on "extraordinary restitution." Thus, in this case, we consider that question in the first instance.

In considering whether extraordinary restitution is a forbidden departure factor, as the Supreme Court explained, we are "limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor." *Koon*, ____ U.S. at ____, 116 S.Ct. at 2051. Nowhere in the Guidelines is restitution listed as a proscribed factor. Thus, the Commission has not forbidden departure on this basis.

Nor has the Commission expressly included restitution in the Guidelines' lists of encouraged or discouraged factors. *See* U.S.S.G. § 5K2.0 *et seq.* § 5H1.1 *et seq.* Although the Commission has not listed restitution as a factor to consider in *departing from the Guidelines*, restitution is listed as a factor supporting a reduction *within the Guidelines*. Restitution is included among the factors courts should consider in determining whether to reduce a sentence for the defendant's "acceptance of responsibility." *See* U.S.S.G. § 3E1.1 Application Note 1(c) (enumerating seven factors a court should consider in determining whether to reduce a sentence for acceptance of responsibility, including the "voluntary payment of restitution prior to adjudication of guilt").

When the Commission designates a factor as a basis for a reduction *within* the Guidelines, this implies that the factor is discouraged as a basis for departure *from* the Guidelines, or alternatively, that the factor is encouraged—at least as a basis for reduction—but has already been taken into account. In either case, ordinarily a court should not depart based on such a factor. *See United States v. Broderson*, 67 F.3d 452, 458 (2d Cir. 1995) ("Ordinarily, payment of restitution is not an appropriate basis for departure under Section 5K2.0 because it is adequately taken into account by Guidelines Section 3E1.1" and is therefore a

"discouraged" basis for departure).

However, simply because the Commission designates a factor as an appropriate basis for a reduction does not mean that the factor may never properly support a district court's departure decision. As Congress and the Commission have directed, a factor that the Guidelines address may still provide a proper ground for departure when present to such a degree that a case is removed from the "heartland" for which the guideline was designed. *See* 18 U.S.C. § 3553 (incorporated in Guideline § 5K2.0) (sentencing court may depart when court finds "an aggravating or mitigating circumstance of a kind, or *to a degree*, not adequately taken into consideration" in formulating the Guideline range) (emphasis added).

Thus, restitution, although taken into account in the guideline permitting a reduction for acceptance o responsibility, can provide a basis for a departure when present to such an exceptional degree that it cannot be characterized as typical or "usual." *See United States v. Garlich*, 951 F.2d 161, 163-64 (8th Cir. 1991) (ruling that district court has discretion to depart from Guidelines due to extraordinary restitution if defendants show that the circumstances of their cases are atypical); *United States v. Brewer*, 899 F.2d 503, 509 (6th Cir.) (departure may be warranted where defendant shows repayment constituted an "exceptional circumstance"), *cert. denied*, 498 U.S. 844, 111 S.Ct. 127,112 L.Ed.2d 95 (1990); *see also United States v. Hendrickson*, 22 F.3d 170, 176 (7th Cir.)(same), *cert. denied*, ____ U.S. ____, 115 S.Ct. 209, 130 L.Ed.2d 138 (1994). *Cf. United States v. Bailey*, 975 F.2d 1028 (4th Cir. 1992) (affirming district court decision not to depart from the Sentencing Guidelines where there was no evidence that the court believed it was without power to depart based on "extraordinary restitution").

C.

We turn now to review of the district court's conclusion that Hairston's efforts at restitution removed this case from the "heartland" of restitution cases and merited departure. Relying in part on the bank officer's testimony, the district court found Hairston's restitution extraordinary because, due to her efforts and her friends' generosity, the bank recovered "substantial fractions of the monies that [it] lost which would otherwise not [have] be[en] available."

The $250,000 Hairston repaid the Bank is, of course, a large amount of money—but it constitutes less than half the amount she embezzled. Consideration of existing caselaw reveals no case in which such a small percentage in restitution has been held to constitute an exceptional circumstance meriting departure. *Cf. United States v. Arjoon*, 964 F.2d 167, 171 (2d Cir. 1992) (finding departure unwarranted where defendant stole 5,000 shares of stock worth $489,000, and then returned 2,000 shares plus $51,000 (approximately fifty percent of the amount stolen), because the restitution involved was not "substantially in excess of that which is ordinarily involved") (quoting U.S.S.G. § 5K2.0); *United States v. Carey*, 895 F.2d 318, 322-24 (7th Cir. 1990) (departure unwarranted where defendant paid $200,000 out of victim's $220,000 loss); *United States v. Davis*, 797 F.Supp. 672, 677 (N.D.Ind. 1992) (departure warranted where defendant repaid $775,000 of victim's loss assessed at between $500,000 and $800,000).

Indeed, our sister circuits have found even full restitution not an appropriate ground for departure from the Guidelines, but simply ground for a reduction within the Guidelines. *See United States v. Bean*, 18 F.3d 1367, 1369 (7th Cir. 1994) (finding repayment of the entire amount fraudulently obtained from a bank ($75,000) constituted the restitution

contemplated under Note 1(c) to § 3E1.1 and the defendant was therefore limited to a reduction within the Guidelines); *Brewer*, 899 F.2d at 509 (prompt repayment of entire $25,000 stolen only entitled defendant to a reduction within Guidelines, not departure).

Courts have generally found restitution in amounts greater than that stolen to be possible ground for departure. *See Garlich*, 951 F.2d at 163 (district court erred in failing to exercise its discretion to determine if defendant who turned over assets of $1.4 million to cover loss of $253,000 merited departure for extraordinary restitution); *United States v. Miller*, 991 F.2d 552, 553-54 (9th Cir. 1993) (remanding for district court to determine whether $58,000 repaid for $45,000 embezzled constituted atypical restitution); *United States v. Lieberman*, 971 F.2d 989, 996 (3d Cir. 1992) (affirming departure where defendant agreed to pay "$34,000 more than he thought he owed and to which he pled guilty").

We do not suggest that a defendant must necessarily provide more than full restitution (or full restitution for that matter) in order to remove her case from the ordinary. For example, exceptional acceptance of responsibility might be indicated by partial restitution gained through especially hard work, such as by taking a second job. Repayment, however, of less than half of the money stolen under the circumstances of this case appears far removed from "exceptional." When a defendant asserts that a restitution payment is so exceptional as to remove it from the ordinary (thereby meriting departure, rather than simply reduction), the same theory that supports the guideline reduction for restitution should also support the departure. Since the Guidelines consider restitution a form of "acceptance of responsibility," extraordinary restitution

should provide a ground for departure when it indicates an extraordinary acceptance of responsibility. *See United States v. Weinberger*, 91 F.3d 642, 1996 WL 431811, *3 (4th Cir. 1996) ("extraordinary restitution ... is a basis for downward departure only to the extent it shows acceptance of responsibility") (quotation omitted), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1841, 128 L.Ed.2d 467 (1994).

Here, Hairston did not pay the bank $250,000 in restitution until after she had been criminally indicted, in order to settle her civil liability, and in the hope of receiving a reduced sentence. The timing of the restitution payment, after criminal proceedings had begun, does not suggest an exceptional acceptance of responsibility, *cf. Garlich*, 951 F.2d at 162-63 (finding significant that the defendant discussed the settlement *before* learning of the FBI investigation and offered to settle even though his attorney advised him that it was unnecessary), nor does her motive. *See Miller*, 991 F.2d at 553 (stressing that the "voluntary" nature of restitution is questionable when defendant's primary motivation is to settle a civil lawsuit); *see also United States v. Bennett*, 60 F.3d 902, 905 (1st Cir. 1995) (same); *United States v. Flowers*, 55 F.3d 218, 222 (6th Cir.) (same), *cert. denied*, ____ U.S. ____, 116 S.Ct. 261, 133 L.Ed.2d 185 (1995).

For similar reasons, the generosity of Hairston's friends indicates little about Hairston's acceptance of responsibility for her conduct. *See Miller*, 991 F.2d at 553 ("restitution is relevant tot he extent it shows acceptance of responsibility"); *Bennett*, 60 F.3d at 905 (same). *Cf. United States v. Bolden*, 889 F.2d 1336, 1340-41 (4th Cir. 1989) (*borrowed* money used to repay bank may be relevant in permitting reduction within Guidelines but does not justify departure).

Finally, while the district court, of course, could consider the bank officer's testimony that Hairston's payment constituted extraordinary restitution, the relevance of that testimony is minimal. We do not doubt that absent the generosity of Hairston's friends the bank would have recouped little. However, the victim's opinion that Hairston's efforts were extraordinary, even if not offered in exchange for the civil settlement, provides little basis for the court's conclusion that the restitution was extraordinary. The court's conclusion must be based on sentencing experience, consideration of other guidelines cases, and the Sentencing Commission's guidance.

Accordingly, although we defer to the district court's greater experience, and although we recognize that the district court sees many more guidelines cases than appear in published opinions, *see Koon*, ____ U.S. at ____, 116 S.Ct. at 2047, because the circumstances of the restitution in this case are so far removed from those found exceptional in existing caselaw, we hold that the district court abused its discretion in finding Hairston's restitution provided a proper basis for departing from the Guidelines.

III.

For the foregoing reasons, we reverse Hairston's sentence and remand to the district court for resentencing in accordance with this opinion.

REVERSED AND REMANDED.